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No. 83-1180

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner,

v.

UNITED AIR LINES, INC.

and

ASSOCIATION OF FLIGHT ATTENDANTS

and

JOYCE BARR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY OF PETITIONER TO BRIEFS OF RESPONDENTS IN OPPOSITION AND SUPPORT OF PETITION

ISAAC N. GRONER
Counsel of Record
WALTER H. FLEISCHER
JAMES A. BENSFIELD
COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D.C. 20006
(202) 331-8888

THOMAS R. MEITES
LYNN SARA FRACKMAN
MICHAEL M. MULDER
MEITES & FRACKMAN
135 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The heavy reliance of Respondents on contentions which were rejected below—indeed which were rejected by this Court in its previous consideration of this case, *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977)—and their failure to defend squarely major grounds of the decision below, only emphasize the departure of that decision from the governing law.

1. *Opposition of United Air Lines*

United primarily contends that the granting of retroactive competitive seniority to the class is either barred by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), or is inequitable, because most members of the class did not file individual timely charges with the Equal Employment Opportunity Commission. The Court below rejected United's contention (Pet. App. 32a-35a), and that contention is unsound. *Evans* was not a class action, and as this Court subsequently noted in this very case (432 U.S. at 389 n.6):

> "6. As the opinion in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, makes clear, full relief under Title VII 'may be awarded on a class basis . . . without exhaustion of administrative procedures by the unnamed class members.' *Id.*, at 414 n.8. See also *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771."

As stated in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975), the Courts of Appeals had unanimously rejected the view that each class member must file a separate EEOC complaint, and "[t]he Congress plainly ratified this construction of the Act in the course of enacting the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103."

To suggest that class members, although they can sue, should be deprived of relief otherwise available if they did not individually file complaints with the EEOC, clashes with this unbroken precedent, including the specific ruling by this Court in this case that "full relief" is available to such persons. If a failure to file separately had the consequences urged by United, individual class members would have to flood the EEOC with duplicative complaints, defeating the intention of Congress, contravening the purposes of class handling of disputes, and seriously burdening the machinery of the EEOC. Further, to penalize class members without prior warning for following

a course approved by the Courts and Congress, of reliance upon complaints of others, would be anything but equitable.

Other contentions of United requires only brief comment. Insofar as United asserts that the class action "has hung by the thinnest of threads" or is "a hollow shell" in which class members seek a "windfall," that hyperbole is baseless. In part it merely repeats United's view that anyone whose claim relies on the fact that others have filed EEOC complaints is not a real plaintiff and lacks equities. In part it is merely caviling over prior judicial decisions adverse to, but binding upon, United, regarding class action issues. But in part it also meretriciously disparages hundreds of women by implying that anyone who has failed to become discouraged by United's success in delaying relief for more than twelve years since the underlying practice was held invalid must be trying to gain something to which she is not entitled.[1] Such attacks are diversionary; they are not responsive to the issues on their merits and they only emphasize the inequity of subordinating the rights of the class to those of persons hired during that period.

United also characterizes the openings approach as a "sham" (Br. in Opp. 9). If so, review is all the more warranted, as many other Courts have accepted it. Finally, United while not responding in detail to the contention (Pet. 11-17) that the Courts below denied Petitioner's class relief for invalid reasons, debilitating to effective enforcement of Title VII, stresses its threat to harm incumbents if the class is given adequate relief, explaining that this would serve its economic interests (Br.

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[1] In the District Court, United has not admitted that a single one of the flight attendants who have sworn that their departure from United's employment was due to the no-marriage rule was telling the truth. It has put every one of these women to their proof, requiring hundreds of hearings and further delaying the award of relief.

in Opp. 9-10). That position, adopted below, also should be scrutinized by this Court on the merits.

2. ***Opposition of Association of Flight Attendants.***

Most of AFA's arguments already have been anticipated, and we will not repeat the points made in the Petition, to which the Court is respectfully referred. AFA's position depends on an unsound equation of the effects of immediate reinstatement of the entire class with reinstatement on an openings basis. It characterizes alleged effects of granting the class retroactive seniority as the same "whether immediate or by openings . . ." (Br. in Opp. 6). But nothing supports such an equation; it has obviously been rejected by other Courts.

The evidence presented at trial by AFA or United was directed to effects of immediate reinstatement of the entire class. No one testified, for example, that there would be *any* discharges of incumbents, or that there would be displacement of any incumbents from their present domiciles if Petitioner's class were reinstated as openings occurred. The seniority provisions of the collective bargaining agreement (AFA Exhs. 1 and 2) do not provide for such an occurrence. While the District Court noted that under the openings proposal "the impact of reinstatement in terms of involuntary transfers would be vitiated," it dubbed the proposal unrealistic (Pet. App. 72a). The equation of the openings approach with immediate reinstatement irrespective of whether openings exist is not grounded in evidence or "the unique facts of this case" (AFA Opp. 6); rather it is a novel legal theory, explained only by the argument that the two should be treated as the same because Petitioner reserved the right to return to court if the openings approach resulted in too slow a reinstatement pace (Pet. App. 25a-26a). That mode of analysis, which Respondents fail to support, is inconsistent with the approach of other Courts of Appeals, and with the Court's duty under *Franks* v. *Bowman Trans-*

portation Co., 424 U.S. 747 (1976), and it is illogical and inequitable.[2]

The AFA does not deny the novelty of the ruling below, but asserts that more employees are involved here than in other cases following the openings approach. In fact, the class of discrimination victims is no greater a portion of the affected employees here than it was in other cases adopting the openings approach;[3] and that approach by its nature ameliorates any undue effect of a significant number of victims of discrimination being suddenly reintroduced into the work force. AFA cites only one case, *EEOC* v. *American Tel. & Tel. Co.*, 556 F.2d 167, 178 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978), as a supposed example of an appellate court not requiring full competitive seniority to discriminatees. However, that case—the general tenor of which is quite unfavorable to Respondents' position—involved a consent order between an employer who had been alleged but never found to have discriminated, and a class of persons who were not identified victims of discrimination.[4] That the Court approved

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[2] Although the issue is, like that decided in *Franks*, one of the proper standards to apply, if somehow it were deemed "factual" then the rulings below would be clearly erroneous, as no evidence was offered to support the improbable proposition that a return as openings occur approach would have the same effect as immediate reinstatement.

[3] *E.g.*, *Franks*, *supra*, 424 U.S. at 776 n.36, 495 F.2d 398, 410 n.10 (class was 166 out of 510, or 33 percent); *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 331-332, 337 (1977) (334 class members in work force of 1,828, or 18 percent); *Ass'n Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256, 286 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (102 out of 512, or 20 percent). Here the class, assuming the high estimate of 1,400 used by the Court below, would not exceed about 16 percent of the work force.

[4] In contrast, the only persons entitled to reinstatement here are those found to have been injured by United's no-marriage rule at individual adversarial hearings. But even persons who are not

the agreement of the parties, which included a compromise granting only partial competitive seniority, is no precedent for the ruling below uncompromisingly denying such seniority to a class of those who are the identified victims of a practice adjudicated to be illegal.[5] The ruling below is unprecedented in that regard, and seriously alters the landscape of issues of relief in Title VII cases.

3. *Barr's Response.*

Joyce Barr, who is a member of the class, seeks to raise the issue of whether the Courts below improperly decided the competitive seniority issues before the individual hearings were completed. Petitioner McDonald, as representative of the class, urged the District Court to hear at least test cases before passing on those issues. United and the AFA, however, persuaded the District Court to decide them before any individual hearings took place. Once the District Court denied retroactive competitive seniority, Petitioner concluded that in view of the delay in obtaining relief which the class already had suffered, the correctness of the District Court's decision should be tested promptly on appeal. At this stage of the litigation 15 to 18 years have elapsed since the discriminatory acts and more than 12 years since liability was established.

The many persons who have been, or will be, returning to work necessarily must know their seniority status be-

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identified victims of discrimination have been protected from the loss of competitive seniority. *Cf. Stotts* v. *Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *cert. granted sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 462 U.S. ——, 103 S.Ct. 2451 (1983).

[5] The *AT&T* litigation is instructive in that even though tens of thousands of employees were involved, and even though it was reviewing a consent judgment, the Court did not evince a passivity toward the rights of claimed victims of discrimination like that which occurred here.

fore they can return. In these circumstances, Barr's position would cause even further delays in reinstatement and is not practicable. Petitioner submits that she has identified error in the ruling below ample to warrant reversal. Barr's further position that if any premise of the ruling below is incorrect, this Court is being asked to issue an "advisory opinion," is unsound. Unfortunately, the effect upon the class of denial of the seniority sought is all too concrete and real.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ISAAC N. GRONER
Counsel of Record
WALTER H. FLEISCHER
JAMES A. BENSFIELD
COLE AND GRONER, P.C.
1730 K Street, N.W.
Washington, D.C. 20006
(202) 331-8888

THOMAS R. MEITES
LYNN SARA FRACKMAN
MICHAEL M. MULDER
MEITES & FRACKMAN
135 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

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